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Supreme Court, U.S.
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No. 97-948

In The

Supreme Court of the United States

October Term, 1997

JACK ECKERD CORPORATION,

Petitioner,

vs.

THOMAS SHANNON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The respondent respectfully restates the "Question Presented" so as to have it more accurately reflect the precise issue before the Court under the terms and circumstances of this case (*see* Supreme Court Rules, Rule 15, paragraph 2):

A.

WHETHER THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (1) IS IN DIRECT CONFLICT WITH ANY APPLICABLE DECISION OF EITHER THIS COURT OR OF ANY FEDERAL COURT OF APPEALS AS TO ANY ISSUE HEREIN DECIDED, OR (2) DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT YET BEEN SETTLED, BUT SHOULD BE SETTLED, BY THIS COURT.

PARTIES/INTRODUCTION

The respondent, Thomas Shannon, was the plaintiff in the trial court and was the appellee in the Eleventh Circuit Court of Appeals. The petitioner, Jack Eckerd Corporation, was the defendant/appellant. In this brief of respondent in opposition to the petition for writ of certiorari the parties will be referred to as the petitioner and the respondent and, alternatively, by name. The references "Pet. App." and "Resp. App." will refer to the petitioner's appendix and the appendix accompanying this brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

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STATEMENT OF THE CASE

A. History of the Proceedings

At the outset, with due regard for what the petitioner has recited in its "Statement" and with further recognition for the contentions and arguments advanced in that portion of the petition denominated "Reasons For Granting The Petition," respondent suggests that neither the issues petitioner advances nor the basis upon which the lower courts premised their rulings and/or decisions should be viewed in the abstract. As the Court of Appeals stated in affirming the trial court's judgment:

> . . . We must determine whether the Plan Administrator's decision was arbitrary and capricious (citation omitted). A decision to deny benefits is arbitrary and capricious if no reasonable basis exists for the decision. Id. In this case the District Court found that in evaluating whether the proposed procedure was experimental or investigational, the Plan Administrator relied only on Medicare's denial of coverage, a conclusory recommendation of denial from Cost Care, the plan's medical consultant, and the statements of several insurance companies that pancreas transplants were "investigational". *The court concluded that this was an insufficient basis to support the denial.* Simply accepting the bald assertion of Cost Care and the denial of other insurance companies *without examining or evaluating their underlying bases* and *failing to obtain additional relevant information* was arbitrary and capricious. We cannot say that the District Court erred in remanding for the Plan Administrator to make a reasonably relevant inquiry.

> Nor can we say that the District Court erred in directing the Plan Administrator to consider subsequently available evidence. The District Court relied on Bucci v. Blue Cross-Blue Shield of Conn., 764 F. Supp. 728, 732 (D. Conn. 1991), holding that since a defendant's duty to provide benefits "is a continuing one, its refusal to provide benefits is thus a continuing denial, the propriety of which is measured against the information available from time to time." Eckerd's Plan Administrator had an obligation to make a reasonably relevant inquiry and failed to do so at the time of the original determination. The District Court did not err in considering that the Plan Administrator consider *all* available evidence (citation omitted).

(Pet. App. 20, 21).

B. "The Plan Administrator"

Micki Keener is the manager of employee benefits of the petitioner and *is* its plan administrator (Resp. App. 1a-4a). She has no medical background. The petitioner employed no physicians trained in the field of transplant medicine. The respondent provided Keener's first experience with transplants (Resp. App. 5a-7a).

At all times pertinent it was undisputed that the subject plan would not cover transplants deemed "experimental" or "investigational." The subject plan gives discretion to the plan administrator to decide what is "experimental" and/or "investigational" (Resp. App. 22a-23a). What the plan *did not give* was a definition for either term. Keener herself had no knowledge of the medical definition of the words (Resp. App. 7a-8a).

Under the plan, as amended, Keener had the duty to determine whether or not benefits (transplants) were covered.

In this vein, and consistent with reasonable protocol, consultants were hired to give advice (Resp. App. 11a-14a). In this case the consultant was Cost Care, Inc. (Resp. App. 14a).

Keener had her own "working definition" for the two subject phrases (Resp. App. 23a-24a). She did not get them from any dictionary (Resp. App. 23a-24a). She made no effort to determine if anyone else agreed with her definitions (Resp. App. 23a-24a):

> I didn't need anything more than my working definition.

(Resp. App. 23a).

Keener did not compare her working definition with anyone else's (Resp. App. 23a-24a). Keener candidly admitted she never spoke to anyone at Cost Care about the predicate for the opinions rendered as a consequence of the letter of September 7, 1990. Keener stated:

> a. I would not question their medical opinions.

(Resp. App. 10a); and

> b. *She did not think it would have been appropriate for her* to call Cost Care *to ask who they inquired of*, who or what they read in formulating the opinions, etc.

(Resp. App. 10a-14a).

Post (initial) denial, and upon statutorily authorized and plan mandated review, Keener was given more information from Dr. Sutherland. *Most, if not all, of what she was given established that the requested transplant was neither experimental nor investigational.* In this regard the trial court noted:

> After receiving Dr. Sutherland's letter of October 27, 1990, the Plan Administrator had notice that Cost Care's conclusion that the procedure was investigational may have been made without all of the data relevant to survival rates post-transplant and without any consideration for quality of life improvements associated with the procedure. Despite this notice, the Plan Administrator did nothing to ensure a more thorough evaluation. The Plan Administrator did not engage another medical consultant for a second evaluation, despite her conclusion that a second evaluation was necessary. She did not contact Dr. Sutherland — one of the country's leading authorities on the procedure and Shannon's treating physician — for further explanation of his criticisms of Cost Care's evaluation. She did not request that Cost Care review its conclusion nor demand that Cost Care issue a more complete explanation of the basis for its conclusion. In fact, the Plan Administrator did not even *contact* Cost Care to apprise Cost Care of the new information that she had received. The Plan Administrator failed to take any of these actions despite her admitted inability to comprehend either the substance or significance of information related to the medical status of the pancreas transplant procedure. The Court concludes that the Plan Administrator simply ignored the information the Sutherland letter of October 27, 1990 criticizing Cost Care's evaluation.

(Pet. App. 13, 14).

Keener testified she contacted a limited number of insurance companies to ask about transplants and whether same were

covered. Keener never requested the persons who she contacted at any of the insurance companies to send to her a copy of *their plans* to review nor did she ask "why." Hence, Keener really did not know *why* those companies *denied* transplant benefits (Pet. App. 13, 14; Resp. App. 15a).

Likewise, Keener never contacted any pancreas transplantation performing physicians (anywhere) to ask *them* if they considered the procedure to be experimental or investigative (Resp. App. 20a-21a).

The plan (as "ERISA" requires) provided for review of a denial of benefits (Resp. App. 17a). Keener admitted that even if it came to her attention that some error was made in Cost Care's methodology of determining the claim, she could not say whether any other actions would have been taken (by her) (Resp. App. 18a-19a). In point of fact *Keener admitted that even upon review no matter what may have been advanced (by the appealing claimant) all she wanted was Cost Care's bottom line*! (Resp. App. 20a).

C. "A Proper Perspective"

Given the above, this Court can clearly see that what the petitioner now complains of, evolved *not because* the trial court ruled that the Plan Administrator was "incorrect" in her ultimate decision, but, rather, because the Plan Administrator simply accepted:

> . . . the bald assertion of Cost Care and the denial of other insurance companies without examining or evaluating their underlying bases and failing to obtain additional relevant information . . .

(Pet. App. 21).

Absent from the subject petition is any reference to the trial courts order *denying* the petitioner's motion for new trial

(Resp. App. 27a-32a). In that order the trial court highlighted the flaws in the petitioner's analysis:

> This cause comes before the Court upon Defendant Jack Eckerd Corporation's ("Eckerd") Motion for a New Trial. After due consideration, Eckerd's motion is DENIED. While the contentions Eckerd advances were addressed in the Court's Findings of Fact and Conclusions of Law, issued November 18, 1992. The present order seeks to clarify any ambiguity that may have been raised by the Order of November 18, 1992.
>
> * * *
>
> In support of its determination that the Plan Administrator failed to adequately investigate the medical status of the pancreas transplant procedure, the Court found that the October 27, 1990 from Dr. Thomas Sutherland — Shannon's treating physician — to the Plan Administrator constituted notice to the Plan Administrator that Cost Care's conclusion that the procedure was investigational may not have been well founded. Eckerd contends that the information referenced in the letter had already been transmitted to Cost Care by the time the Plan Administrator received the letter and that the Plan Administrator was aware of this transmission. Even if this contention is correct, it is irrelevant. *The fact that one of the nation's leading authorities on pancreas transplants raised significant objections to Cost Care's conclusion should have induced the Plan Administrator to either question Cost Care as to the basis for its conclusion or to engage a second medical consultant for another evaluation. The Plan Administrator did neither.*

* * *

Eckerd also objects to the Court's requirement that, in making a new determination on remand, the Plan Administrator consider all relevant evidence available up to the date of the new determination. All of the relevant decisional authority on point is consistent with this proposition. In *Jett v. Blue Cross and Blue Shield of Alabama*, 890 F. 2d 1137 (11th Cir. 1989), for instance, the Eleventh Circuit quoted a Seventh Circuit decision for the proposition that:

> As a general matter a court should not resolve the eligibility question on the basis of evidence never presented (to an ERISA plan's administrator) but should remand to the (administrator) for a new determination.

This language clearly prohibits the *district court* from considering evidence not presented to an ERISA plan administrator when reviewing the administrator's decision under the arbitrary and capricious standard. To allow the district Court to consider such evidence would convert review under the arbitrary and capricious standard into *de novo* review.[2] Nothing in the quoted language, however, suggests that a plan administrator to is not obligated to consider this evidence. To the contrary, the purpose of remand is to provide the plan administrator with the opportunity to consider the evidence.

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2. All of the cases cited by Eckerd simply preclude the *district court*, not the plan administrator, from considering new evidence.

(Resp. App. 30a).

Berry v. Ciba-Geigy Corp., 761 F. 2d 1003 (4th Cir. 1985) provides the clearest expression of this position. In *Berry*, a case cited with approval by both the Eleventh Circuit and Eckerd, the Fourth Circuit explained that:

> While it is open to the trial judge to consider whether ... (the plan administrator) erred in not securing sufficient evidence on which to base a termination decision, it was error for the court to admit into evidence ... after the fact testimony ... If the court believed the administrator lacked adequate evidence, the proper course was to "remand to the trustees for a new determination." ...

Clearly, if the plan administrator failed to gather sufficient evidence in the course of rendering the first decision, the plan administrator cannot rely exclusively on that evidence in rendering the decision on remand. Rather, the plan administrator must gather enough additional evidence as is necessary to ground a reasonable decision. Moreover, on remand, the plan administrator is obligated to make a *new* determination — i.e., to make a determination as though no prior determination had been made. As a consequence, the plan administrator is obligated to consult all relevant evidence available up to the date of the new determination. Requiring the plan administrator to consult such evidence does not affect the plan administrator's discretion in rendering the decision on remand, it merely requires that the decision be reasonable in light of all the facts presently available.

The respondent reserves the right to argue the significance of the above facts in the argument portion of this brief.

REASONS FOR DENYING THE WRIT

THE OPINION OF THE ELEVENTH CIRCUIT HEREIN SOUGHT TO BE REVIEWED: (1) IS NOT IN CONFLICT, DIRECT, INDIRECT, EXPRESS OR IMPLIED WITH THE TWO DECISIONS OF THE EIGHTH CIRCUIT RELIED UPON; AND (2) DID NOT DECIDE ANY IMPORTANT QUESTION OF FEDERAL LAW SUCH THAT THIS COURT SHOULD EXERCISE ITS DISCRETION AND REVIEW THE MERITS OF THIS CASE.

The petitioner contends, at page 6 of its petition:

> Even assuming *arguendo* that the 11th Circuit was correct in affirming the District Court's finding that the plan acted arbitrarily and capriciously in denying respondent Shannon benefits for the pancreas transplant and remanding the matter to the petitioner plan for reconsideration, the appellate court nevertheless erred in affirming the District Court's directions to the plan to consider on remand evidence available after the date of the plan's original coverage decision. *The 11th Circuit's decision is squarely in conflict with the decisional law of the Eighth Circuit, notably the decisions in Bernards v. United of Omaha Life Insurance Co.*, 987 F. 2d 486 (1993) *and Cox v. Mid-America Dairymen, Inc.*, 965 F. 2d 569 (Eighth Cir. 1992) . . .

The respondent would suggest to this Court the opinion herein sought to be reviewed is not in conflict with either one of the two opinions relied upon. As there exists no conflict between

decisions, respondent requests this Court to exercise its discretion and *deny* merits review.

Cox v. Mid-America Dairymen, Inc., 965 F.2d 569 (8th Cir. 1992), a two-one decision by a panel of the Eighth Circuit, involved an appeal from an order of the trial court which *granted summary judgment* to the employee. In reversing the judgment appealed the Court, after stating the facts, concluded:

> We have previously noted that, in order to properly apply the differential standard of review, a reviewing court must be provided the rationale underlying the trustee's discretionary decision (citation omitted). On this record, we conclude that the retirement committee has failed to provide a sufficient explanation of its rationale, in light of the plan provisions that it was applying, *to permit us to review* its decision under the appropriate differential standard of review. As we noted (citation omitted) reviewing courts should avoid unduly complicating the task of plan trustees with unnecessary formal requirements. But when critical terms of the plan are ambiguous and conflicting medical evidence could arguably support a decision either way, we believe that Congress in ERISA, as well as traditional trust law principles . . . require that ERISA trustees *adequately explain the basis for their discretionary decisions.*
>
> Accordingly, we reverse the District Court's award of benefits and attorney's fees in favor of Cox. The case is remanded to the District Court with directions to remand to the retirement committee for reconsideration of Cox' application for disability benefits . . .

965 F.2d at 574. The opinion, as herein relevant, stands for the proposition that where the administrator fails to provide the

rationale underlying his (her or its) discretionary decision so that the reviewing court is *unable* to determine, "under the appropriate differential standard of review," 965 F.2d at 574, whether the trustee adhered to the plan's term, etc. reversal and remand is appropriate. However, in *Cox* the appellate court had before it *neither* the issue of what evidence the plan administrator should consider on remand *nor* the issue of whether the plan administrator abused its discretion! The court dealt only with the threshold issue of whether the plan administrator adequately explained:

> . . . the basis for their discretionary decisions . . .

965 F.2d at 574. Such is *not* the instant cause! As has already been pointed out in the respondent's "Statement of the Case," the trial court determined here that the Plan Administrator acted arbitrarily and/or capriciously in ignoring much of the information that was available to her. *Cox, supra*, is both factually and legally distinguishable from the instant cause.

Likewise, the petitioner's reliance upon *Bernards v. United of Omaha Life Insurance Company*, 987 F.2d 486 (1993), is equally misplaced.

Bernards, like *Cox*, involved an appeal by the company from an order granting *summary judgment* in favor of the insured. In *Bernards*, like *Cox*, the appellate court reversed *because*:

> . . . We now conclude that the record before the District Court was *insufficient* to finally determine *whether* United's denial of benefits was arbitrary and capricious or an abuse of discretion.

987 F.2d at 487. However, in *Bernards*, ***unlike Cox***, because the factual situation involved the rapidly deteriorating health of the insured, the appellate court noted:

> . . . This case is more complicated, however, because the emergency situation has caused the parties to bypass the binding arbitration procedure provided in the plan and to seek immediate judicial review. To conduct meaningful review in *these* circumstances, the District Court must obtain from United a further explanation of its decision, afford Bernards the opportunity to present evidence challenging the decision (he surely would have presented evidence had he appealed the decision to an arbitration panel), and then apply the differential standard of review to the expanding record . . .

987 F.2d at 489.

The instant cause presents no situation "analogous to" either *Cox* or *Bernards*. On page 7 of the petition it is argued:

> In neither Cox nor Bernards was the ERISA plan directed to consider evidence which may have developed in a lengthy period of time between the time of the participant or beneficiary's benefits claim and a time of remand. Rather, the Eighth Circuit's decisions make it clear that the remand is only for the purpose of the plan being able to better explain and, if need be, to reconsider the evidence that it had before it at the time it made its original decision.

With all due respect to the petitioner's right to *advance* an argument, the petitioner has gotten off track.

First, the Eighth Circuit has *not* "addressed this issue." All that occurred in each one of the two cited authorities was a reversal of a *summary final judgment* because "explanation" for the initial determination regarding benefits was lacking. The

issue advanced herein by the petitioner was never reached, much less advanced, addressed or identified in either *Cox* or *Bernards*!

Second, save for the two Eighth Circuit cases cited by the petitioner as support for the proposition it advances to this Court, there does not seem to be *any* citation by the petitioner to any other cases "on the issue" at all, much less to support a conclusion that:

> The Eighth Circuit's approach is the correct one and represents the majority view of courts which have had occasion to reach this issue . . .

Petition at 7. Respondent does not disagree with the principles of law found in the cases cited by petitioner which generally recognize that medical science is a dynamic process and, what may be experimental today may be accepted therapy tomorrow. *See* petition at 7. The respondent, however, does not believe that *the existence of* such principles requires the result petitioner is struggling to reach. It is for precisely this very reason why the result here does not "conflict with," "run afoul of," or "do injustice to," the cases otherwise cited at page 8 of the petition, exemplified by the case of *Sheppard & Enoch Pratt Hosp. Inc. v. Travelers Ins. Co.*, 32 F.3d 120, 125 (4th Cir. 1994) which the petitioner extensively quotes:

> We continue to adhere to the view expressed in Berry that an assessment of the reasonableness of the administrator's decision must be based on the facts known to it at the time. Thus, *although it may be appropriate for a court conducting the de novo review of a plan administrator's action to consider evidence that was not taken into account by the administrator, the contrary approach should be followed when conducting a review under either an*

> *arbitrary and capricious standard* or under the abuse of discretion standard.

See Petition at 8. The instant cause does not collide with *Sheppard* or the other cases cited at page 8 of the petition. In *Sheppard* the court noted that where review obtains under either an arbitrary and capricious standard or under the abuse of discretion standard, a District Court *cannot consider anything* that the plan administrator *did not have available to it at the time of the initial determination*! This is consistent with those principles of law now well established. However, those rules do not apply, nor should they apply, where, as here, *the Court validly finds* that the plan administrator *did act* in an arbitrary and capricious manner. Under this scenario, *in a remand situation*, there exists no reason for the plan administrator to consider only that evidence which it had available to it at the time it made its original coverage decision (and, as here, "ignored")!

On pages 8 and 9 of its petition the petitioner states:

> This confinement of remand to consideration of evidence available at the time when the coverage decision was first made is all the more appropriate when it is considered that petitioner actually had the surgery in June, 1991, and that it failed . . .

The petitioner continues its discussion by noting that while the trial court herein relied upon the case of *Bucci v. Blue Cross-Blue Shield of Connecticut*, 764 F. Supp. 728, 732 (D. Conn. 1991), and that the Eleventh Circuit concluded reliance upon said case was reasonable:

> The Bucci court was not dealing with a remand situation . . .

See Petition at 9. Petitioner continues to seek to place the proverbial "square peg in the round hole." The result reached

here does *not* do injustice to any of the relied upon authorities (nor does it decide an important question of federal law which should be settled by this Court) as the facts of this case do not involve the District Court's consideration of any facts that the Plan Administrator (had or) did not have! As the trial court stated in its "Order" denying the petitioner's motion for new trial:

* * *

> Clearly, if the plan administrator failed to gather sufficient evidence in the course of rendering the first decision, the plan administrator cannot rely exclusively on that evidence in rendering the decision on remand. Rather, the plan administrator must gather enough additional evidence as is necessary to ground a reasonable decision. Moreover, on remand, the plan administrator is obligated to make a *new* determination — i.e., to make a determination as though no prior determination had been made. As a consequence, the plan administrator is obligated to consult all relevant evidence available up to the date of the new determination. Requiring the plan administrator to consult such evidence does not affect the plan administrator's discretion in rendering the decision on remand, it merely requires that the decision be reasonable in light of all the facts presently available.

(Resp. App. 31a).

The trial court clearly drew the distinction that the petitioner herein refuses to acknowledge exists, to wit: where, as here, a court, under a proper analysis, determines that the decision of a plan administrator *was* arbitrary, unreasonable, etc. and remands for reconsideration, *the plan administrator can (and should)*

consider all relevant evidence available up to the date of the new determination. Such a result does not collide with those settled principles of law which recognize that a trial court, in making the initial determination as to whether or not the plan administrator acted in an arbitrary or capricious manner, *cannot consider* evidence extrinsic to the initial determination. However, such is *not* the instant cause.

The trial court's analysis was correct. *If, in a de novo situation, a trial court can consider evidence the plan administrator did not have at the time of the initial determination, why then, in a remand situation, should the plan administrator be solely limited to the criteria in existence at the time of the initial (and arbitrary) decision*?

The respondent would respectfully suggest to this Court the opinion of the Eleventh Circuit, affirming as it does the trial court final judgment in favor of the respondent, is not in conflict with *either Cox* or *Bernards*. Likewise, the opinion does not present an important question of federal law which has not yet been settled, but should be settled, by this Court. As the petitioner's duty to provide benefits is a continuing one, the petitioner's refusal to provide benefits is thus a continuing denial, the propriety of which is measured against the information available from time to time. *See Bucci v. Blue Cross-Blue Shield of Connecticut, supra*. As a consequence the petition for writ of certiorari should be denied.

CONCLUSION

It is respectfully submitted that for the reasons stated herein it can be concluded that the petitioner has failed to demonstrate any conflict within the circuits and has further failed to demonstrate any compelling reason for this Court to exercise its discretion and to review this cause on the merits. The subject petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED SEPTEMBER 21, 1992

[Commencing at Page 3]

MONDAY, SEPTEMBER 21, 1992, 10:09 A.M.

* * * * *

THE COURT: PRESENT YOUR CASE, MR. RATINER.

MR. RATINER: THANK YOU, YOUR HONOR.

YOUR HONOR, AT THIS TIME, THE PLAINTIFF WOULD LIKE I CALL AS AN ADVERSE WITNESS MISS MICKI KEENER.

THE COURT: MISS KEENER, WILL YOU PLEASE COME TO E STAND AND BE SWORN. THERE IS A DOOR OVER THERE THAT YOU JUST — THE COURTROOM SECURITY OFFICER WILL HELP YOU — IT PULLS OUT.

NOW, AGAIN, MA'AM, BE SEATED. WE HAVE ACOUSTICAL PROBLEMS HERE. THE CHAIR DOES NOT MOVE. YOU MUST SPEAK INTO THE MICROPHONE, HOWEVER, AS LOUDLY AS YOU CAN FOR EVERYONE TO BE ABLE TO HEAR.

I'M GOING TO HAVE YOU SWORN BY THE CLERK.

(MICKI L. KEENER, PLAINTIFF'S WITNESS, WAS SWORN.)

Appendix A

CROSS EXAMINATION

MR. RATINER:

Q. GOOD MORNING.

A. GOOD MORNING.

Q. CAN YOU HEAR ME ALL RIGHT?

A. YES.

Q. ALL RIGHT. IF YOU PULL THE MICROPHONE A LITTLE BIT CLOSER, I DON'T KNOW IF THAT'S POSSIBLE, HOW'S THAT?

[4] KENNER – CROSS

A. I'LL JUST SCOOT FORWARD.

THE COURT: DON'T BE UNCOMFORTABLE. AND IT MAY COME TO THE POINT THAT YOU MAY JUST HOLD THE MIKE AND SIT BACK. THAT CAN WORK — WHY DON'T YOU DO THAT?

CAN'T MOVE THAT ANY MORE. OKAY. THEY CHANGED THAT. THANK YOU. ALL RIGHT. LET'S SEE IF WE CAN TILT THAT UP THERE.

(DISCUSSION HAD OFF THE RECORD.)

THE WITNESS: CAN YOU HEAR ME?

Appendix A

THE COURT: YES, I CAN.

WILL YOU PLEASE TELL ME YOUR NAME AND HOW YOU. SPELL YOUR NAME.

THE WITNESS: MICKI KEENER, M-I-C-K-I K-E-E-N-E-R.

THE COURT: ALL RIGHT. NOW DIRECT YOUR ATTENTION TO MR. RATINER.

MS. DOLIN: YOUR HONOR, I'M SORRY, I CAN'T HEAR YOU.

THE COURT: DIRECT YOUR ATTENTION TO MR. RATINER.

MS. DOLIN: THANK YOU. I APOLOGIZE.

BY MR. RATINER:

Q. MA'AM, FOR THE RECORD, WILL YOU PLEASE IDENTIFY YOURSELF AND WHERE YOU LIVE?

A. MICKI KEENER, CLEARWATER, FLORIDA.

Q. AND WHAT IS YOUR AGE?

A. THIRTY-FIVE.

[5] Q. AND WHERE ARE YOU EMPLOYED?

A. WAS I EMPLOYED?

Appendix A

Q. WHERE ARE YOU EMPLOYED.

A. JACK ECKERD CORPORATION.

Q. IN WHAT CAPACITY?

A. MANAGER OF EMPLOYEE BENEFITS.

Q. ARE YOU ALSO THE PLAN MANAGER OF THE JACK ECKERD CORPORATION EMPLOYEE BENEFIT PLAN?

A. PLAN ADMINISTRATOR, YES.

Q. YOU ARE THE OFFICIAL PLAN ADMINISTRATOR?

A. YES.

Q. AND WHEN DID YOU FIRST TAKE ON THAT ROLE AS THE OFFICIAL PLAN ADMINISTRATOR FOR JACK ECKERD CORPORATION?

A. JUNE 1, 1990, AS THE PLAN ADMINISTRATOR OF THE JEC HEALTH BENEFITS PLAN.

Q. AND WHO WAS THE PLAN ADMINISTRATOR BEFORE YOU TOOK OVER?

A. TRAVELERS INSURANCE COMPANY.

Q. NOW, WHEN YOU TOOK OVER AS THE PLAN ADMINISTRATOR IN JUNE, WHAT WAS THE THEN EXISTING DEFINITION FOR TRANSPLANTATION OF ORGANS?

Appendix A

A. PRIOR TO JUNE 1, 1990 —

MS. DOLIN: OBJECT, JUDGE. THIS IS —

THE COURT: IT'S IRRELEVANT. SUSTAINED.

MS. DOLIN: HE ASKED HER —

[6] THE COURT: I KNOW WHAT HE ASKED HER AND I WILL SUSTAIN THE OBJECTION.

MS. DOLIN: THANK YOU. I CAN'T —

THE COURT: CAN YOU HEAR NOW?

MS. DOLIN: YES, NOW I CAN HEAR YOU.

BY MR. RATINER:

Q. AFTER YOU TOOK OVER AS THE PLAN ADMINISTRATOR, WAS THE DEFINITION, WHATEVER IT MAY HAVE BEEN BEFORE, CHANGED?

A. YES. EFFECTIVE JUNE 1, 1990, WE MADE SEVERAL PLAN CHANGES.

Q. AND WHAT WAS THE NEW DEFINITION THAT WAS APPLIED AS TO ENTITLEMENT TO ORGAN TRANSPLANTS?

A. TRANSPLANTS THAT WERE CONSIDERED EXPERIMENTAL OR INVESTIGATIVE, AS DETERMINED BY THE PLAN ADMINISTRATOR, WERE NOT COVERED.

Q. NOW, DID YOU HAVE ANY INPUT INTO THE CREATION OF THAT LANGUAGE?

A. NO.

Q. AS OF JUNE 1ST, WHEN YOU BECAME THE PLAN ADMINISTRATOR, DID YOU HAVE ANY MEDICAL BACKGROUND?

A. NO.

Q. DID ECKERD CORPORATION DIRECTLY EMPLOY ANY PHYSICIANS WHO WERE TRAINED IN THE FIELD OF TRANSPLANT MEDICINE?

A. NO.

Q. AS OF THE TIME THAT YOU TOOK OVER IN JUNE OF 1990, HAD [7] YOU EVER PREVIOUSLY HAD OCCASION TO HANDLE AN ORGAN TRANSPLANT CASE?

A. NO, SIR.

Q. BEFORE TOM SHANNON'S CLAIM, DID YOU EVER HAVE OCCASION CANDLE AN ORGAN TRANSPLANT CASE?

MS. DOLIN: OBJECTION, UNLESS IT'S LIMITED AS TO FRAME.

THE COURT: LET'S HAVE SOME REASONABLE PERIOD OF TIME.

Appendix A

YOU CAME ON BOARD WHEN, MA'AM?

THE WITNESS: I CAME ON BOARD IN MARCH OF '89 AND BECAME PLAN ADMINISTRATOR — I'M SORRY — YES, IN MARCH OF 1989 — AND BECAME PLAN ADMINISTRATOR IN JUNE OF 1989.

THE COURT: ALL RIGHT. DURING THAT PERIOD OF TIME.

MR. RATINER: YES, YOUR HONOR.

BY MR. RATINER:

Q. YOUR ANSWER?

A. I'M SORRY, WOULD YOU PLEASE —

THE COURT: DURING THAT PERIOD OF TIME, DID YOU KNOW OF ANY, DID YOU HAVE OCCASION TO BE INVOLVED IN ANY OTHER RENAL/PANCREAS TRANSPLANT PROCEDURES?

THE WITNESS: NO.

BY MR. RATINER:

Q. NOW, AS OF JUNE OF 1990, DID YOU HAVE ANY KNOWLEDGE OR [8] BASIS AS TO THE MEDICAL DEFINITION OF THE WORD "EXPERIMENTAL"?

A. MEDICAL DEFINITION?

Q. YES.

A. NO.

Q. DID YOU HAVE ANY KNOWLEDGE OF THE MEDICAL DEFINITION OF THE WORD "INVESTIGATIONAL"?

A. MEDICAL DEFINITION? NO, I DID NOT.

Q. NOW, IN JUNE OF 1990, WHEN THE PLAN WAS AMENDED FROM WHENEVER IT REQUIRED BEFORE THAT TO THE NEW LANGUAGE, DID THE PLAN ALSO HAVE A DEFINITION PAGE THAT WOULD PERMIT YOUR MEMBERS TO THUMB THROUGH YOUR PLAN AND TAKE A LOOK AT THE DEFINITION TO SEE WHAT IS MEANT BY THE WORD "EXPERIMENTAL," WHAT IS MEANT BY THE WORD "INVESTIGATIVE"?

MS. DOLIN: OBJECTION, IT'S BEEN ASKED AND ANSWERED.

MR. RATINER: THAT HAS NOT, YOUR HONOR.

MS. DOLIN: SHE —

THE COURT: OVERRULED.

A. NO.

Q. NOW, WHAT PROVISIONS DID THE PLAN OR YOU AS THE PLAN ADMINISTRATOR MAKE FOR THE BENEFIT OF YOUR BENEFICIARIES, OF THE PLAN MEMBERS FOR THEM TO UNDERSTAND WHETHER SOMETHING, A PARTICULAR PROCEDURE WAS OR WAS NOT COVERED?

A. (NO RESPONSE.)

* * *

[28] MR. RATINER: WE ARE INTRODUCING IT RIGHT NOW AS iLAINTIFF'S EXHIBIT NUMBER 2.

THE COURT: ALL RIGHT. IT'S TO BE INTRODUCED INTO HE RECORD AS NUMBER TWO, SO THE RECORD IS CLEAR.

MS. DOLIN: THE DEFENSE HAS NO OBJECTION.

(DISCUSSION HAD OFF THE RECORD.)

BY MR. RATINER:

Q. NOW, YOU'VE ALREADY SAID THAT YOU DID NOT CALL ANY OF THE OTHER INSURANCE COMPANIES OR OTHER PLAN ADMINISTRATORS ON THE LIST PROVIDED TO YOU BY DR. SUTHERLAND TO DETERMINE WHAT THEIR POSITION WAS ON PANCREAS TRANSPLANTS. JUST TO CONFIRM THIS, DID YOU-SEND OUT ANY LETTERS TO THEM OR MAKE ANY OTHER EFFORT AT COMMUNICATION WITH THEM?

A. NO.

Q. NOW, AFTER THIS LETTER CAME IN FROM COST CARE TO MISS AZEM IN WHICH SHE THEN APPARENTLY INCORPORATED INTO HER LETTER TO DR. SUTHERLAND, DID-YOU EVER PICK UP THE PHONE AND SPEAK TO ANYONE AT COST CARE ABOUT THE

Appendix A

PREDICATE FOR THE OPINIONS THAT ARE CONTAINED IN THE LETTER OF SEPTEMBER 7TH?

A. I WOULD NOT QUESTION THEIR MEDICAL OPINIONS, SIR.

Q. WELL, DID YOU EVER GIVE THEM A CALL AND ASK THEM, WELL, WHO DID YOU TALK TO, WHAT DID YOU READ? DID YOU EVER DO THAT?

A. I DON'T — I DIDN'T FEEL IT WAS APPROPRIATE.

Q. IS YOUR ANSWER NO?

[29] A. NO, NO.

Q. YOU DID NOT CALL THEM?

A. I DID NOT CALL THEM.

Q. ALL RIGHT. NOW, DID YOU EVER CALL UP DR. MARLOW AND SAY, DR. MARLOW — OR, FOR THAT MATTER, ANYBODY AT COST CARE — AND SAY PLEASE TELL ME WHAT DOES IT MEAN IN A MEDICAL CONTEXT WHEN A PROCEDURE IS EXPERIMENTAL? DID YOU EVER ASK THEM WHAT THAT MEANS?

MS. DOLIN: OBJECTION, IT'S BEEN ASKED AND ANSWERED.

THE COURT: SUSTAINED.

DON'T ANSWER THAT.

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BY MR. RATINER:

Q. DID DR. MARLOW EVER PROVIDE YOU BY ANY OTHER DOCUMENTS OR MEANS WITH A DEFINITION FOR THE WORD "EXPERIMENTAL" OR INVESTIGATIONAL"?

A. NO.

Q. AND I TAKE IT YOU NEVER LOOKED UP THE TERMS "EXPERIMENTAL" OR "INVESTIGATIONAL" IN THE DICTIONARY, DID YOU?

A. THAT'S CORRECT.

Q. IN FACT, DID YOU IN THE DENIAL OF BENEFITS TO MR. SHANNON IN THIS INSTANCE BOW TO COST CARE'S JUDGMENT TO THIS REGARD?

A. NO.

[30] Q. AGAIN, YOUR DEPOSITION THAT WAS TAKEN ON JULY 10TH, 1991, AT PAGE NUMBER 73:

"QUESTION" — LINE FIVE — "BUT ULTIMATELY YOU ARE THE ONE WHO HAS TO MAKE THE CALL ON THE PROCEDURE, CORRECT?"

YOUR ANSWER: "I'M NOT A DOCTOR AND I DON'T PRESUME TO BE A DOCTOR, AND WHETHER OR NOT THIS DOCTOR'S WELL-REGARDED IN THIS AREA OR NOT, THAT'S NOT FOR ME TO DETERMINE, I CAN ONLY BOW TO COST CARE'S JUDGMENT."

DO YOU RECALL THAT QUESTION AND THAT ANSWER?

MS. DOLIN: JUDGE, I OBJECT. IT'S TAKEN TOTALLY OUT OF CONTEXT. AND I WOULD REQUEST THAT COUNSEL READ THE QUESTIONS PRECEDING IT.

THE COURT: FIRST ANSWER THAT QUESTION, MA'AM. ANSWER THAT QUESTION. DO YOU REMEMBER?

THE WITNESS: THE QUESTION WAS WHETHER I REMEMBER THAT QUESTION AND ANSWER? YES, I DO.

MR. RATINER: ALL RIGHT. I WILL READ THE PREVIOUS QUESTIONS IF THE COURT WISHES ME TO?

THE COURT: PLEASE DO.

MR. RATINER: I THINK 72, LINE 6.

MS. DOLIN: PAGE 72.

BY MR. RATINER:

Q. "NOW, UNDER YOUR PLAN, DO YOU HAVE, AS THE PLAN ADMINISTRATOR, THE DUTY TO DETERMINE WHETHER OR NOT CERTAIN BENEFITS ARE OR ARE NOT PAYABLE UNDER THE PLAN? YOU, IN [31] TURN, GO OUT AND HIRE CONSULTANTS OR OTHER PEOPLE TO TRY TO ADVISE YOU, IS THAT CORRECT?

"ANSWER: CORRECT.

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"QUESTION: NOW IN THIS INSTANCE, YOU HAD A LETTER, A DOCUMENT FROM DR. SUTHERLAND, DAVID SUTHERLAND AT THE UNIVERSITY OF MINNESOTA, IN WHICH HE INDICATED TO YOU THAT A KIDNEY/ PANCREAS TRANSPLANT IS AN ACCEPTABLE PROCEDURE AND IS NOT IN ANY WAY INVESTIGATIVE OR EXPERIMENTAL. DID YOU MAKE ANY EFFORT TO ASCERTAIN WHO DR. SUTHERLAND WAS OR HIS STATUS IN THE MEDICAL COMMUNITY THAT WOULD GIVE HIM THE CREDENTIALS TO MAKE SUCH A STATEMENT?"

YOUR ANSWER: "I DID NOT.

"QUESTION: DO YOU KNOW IF ANYONE DID?

"ANSWER: I DON'T KNOW.

"QUESTION: NOW, IF DR. SUTHERLAND HAD MINIMAL QUALIFICATIONS OR CREDENTIALS IN THIS AREA OR THE AREA OF TRANSPLANT PROCEDURES, WOULD THAT BEAR UPON YOUR DECISION IN, YOU MIGHT SAY, NOT PAYING TOO MUCH ATTENTION TO HIS RECOMMENDATIONS?

"ANSWER: THAT WOULD BE DR. MARLOW'S OR COST CARE'S."

DO YOU REMEMBER THOSE QUESTIONS AND THOSE ANSWERS?

MS. DOLIN: EXCUSE ME. I WANT YOU TO READ THE NEXT, TOO, PLEASE.

[32] BY MR. RATINER:

Q. "QUESTION" — THAT WAS READ BEFORE — "BUT ULTIMATELY YOU ARE THE ONE WHO HAS TO MAKE THE CALL ON THE PROCEDURE, CORRECT?

"ANSWER: AGAIN, I AM NOT A DOCTOR AND I DON'T PRESUME TO BE A DOCTOR, AND WHETHER OR NOT THIS DOCTOR IS WELL-REGARDED IN THIS AREA OR NOT, THAT'S NOT FOR ME TO DETERMINE, I CAN ONLY BOW TO COST CARE'S JUDGMENT."

WERE THOSE YOUR ANSWERS TO THOSE QUESTIONS?

A. YES, SIR.

Q. NOW, I KNOW THAT YOU HAVE ANSWERED MY QUESTION CONCERNING YOUR NOT CONTACTING ANY OF THE DOCTORS THAT WERE ON THE JOURNAL ARTICLES PROVIDED TO YOU BY DR. SUTHERLAND.

OTHER THAN — WELL, STRIKE THAT.

DID YOU CONTACT OR TALK TO ANY OTHER DOCTORS, WHATSOEVER, WHO DO PANCREAS TRANSPLANTS, EITHER IN FLORIDA OR THE UNITED STATES OR ANYWHERE IN THE WORLD TODAY TO GET THEIR OPINIONS OR THEIR DEFINITIONS AS TO WHETHER OR NOT A PANCREAS TRANSPLANT WAS CONSIDERED TO BE EITHER EXPERIMENTAL OR INVESTIGATIONAL?

MS. DOLIN: OBJECTION. IT GOES BEYOND THE TIME FRAME. IT HAS — IT'S IRRELEVANT, THEREFORE, IT HAS TO BE CONFINED TO THE TIME SHE MADE HER DECISION AND HE SAID TODAY.

THE COURT: AT THE TIME YOU MADE YOUR DECISION, . . .

* * *

[34] REVIEW IN FURTHERANCE OF THE APPELLATE PROCESS?

A. NO. COST CARE HAD RENDERED THE MEDICAL OPINION. AT THAT POINT IN TIME, I CONTACTED OTHER INSURANCE COMPANIES IN THE COMMUNITY TO FIND OUT THEIR HANDLING OF SUCH PROCEDURES.

Q. AND YOU CONTACTED WHO?

A. HUMANA, BLUE CROSS AND BLUE SHIELD OF FLORIDA; THE CONSULTANT CONTACTED JOHN HANCOCK.

Q. AND, OF COURSE, AS TO HUMANA AND BLUE CROSS, YOU NEVER RECEIVED ANY WRITTEN DOCUMENTATION FROM THEM, DID YOU?

A. THAT'S CORRECT.

Q. NOW, WITH REFERENCE TO YOUR PLAN CONTRACT WITH COST CARE, ISN'T IT TRUE THAT COST CARE WAS SUPPOSED TO PROVIDE SOME PROCEDURE FOR AUTOMATIC REVIEWS OF THESE MATTERS —

THE COURT: NOW, THAT'S —

BY MR. RATINER:

Q. WITH THE AMOUNT OF BENEFITS?

THE COURT: — THAT'S AN IRRELEVANT ISSUE, MR. RATINER.

MR. RATINER: YOUR HONOR, IT'S THE PLAINTIFF'S POSITION THAT IF COST CARE, AS THE AGENT OF ECKERD, DEVIATED FROM ACCEPTED PROCEDURE, THIS WOULD BE EVIDENCE THAT SHOULD BE HEARD BY THE COURT.

THE COURT: THE CONTRACT BETWEEN COST CARE AND ECKERD IS NOT RELEVANT.

* * *

[36] MR. RATINER.

BY MR. RATINER:

Q. WELL, DID YOU ASSUME THAT COST CARE WOULD CONDUCT AN APPELLATE REVIEW?

MS. DOLIN: OBJECTION, SAME OBJECTION.

THE COURT: OBJECTION SUSTAINED.

DON'T ANSWER THAT, MA'AM.

BY MR. RATINER:

Q. WAS APPELLATE REVIEW ONE OF THE RIGHTS THAT MR. SHANNON HAD UNDER HIS PLAN?

THE COURT: YOU MAY ANSWER THAT.

A. THERE WAS A REVIEW PROCESS, YES.

MR. RATINER: DAVE, LET ME HAVE THE PLAN, PLEASE.

YOUR HONOR, AT THIS TIME, WE WOULD LIKE TO INTRODUCE A COPY OF THE ECKERD PLAN.

THE COURT: LET'S SEE. IS THERE ONE IN THE COURT FILE ATTACHED TO THE COMPLAINT?

MS. DOLIN: JUDGE, THERE IS. WELL, IT'S ACTUALLY ATTACHED TO THE ANSWER. I HAVE A FRESH XEROX FROM THE ORIGINAL DOCUMENT IF YOUR HONOR WOULD PREFER.

THE COURT: YES. GIVE ME THAT HERE, PLEASE, AND THEN YOU CAN USE THAT.

THE PLAN SHOULD BE IN AS PLAINTIFF'S EXHIBIT NUMBER 3.

MS. DOLIN: JUDGE, THIS IS, IN FACT, A COPY OF THE . . .

* * *

[40] MS. DOLIN: SAME OBJECTION. AND, IN ADDITION, IT'S OVERBROAD. AND IT ALSO PRESUMES TO ASK FOR A LEGAL CONCLUSION WITHIN THE CONFINES OF ERISA.

THE COURT: I'M GOING TO OVERRULE THE OBJECTION.

IF IT CAME TO YOUR ATTENTION THAT THERE WAS SOME ERROR IN COST CARE'S METHODOLOGY OF DETERMINING THE CLAIM, WOULD YOU HAVE TAKEN ANY ACTIONS AS A RESULT OF THAT?

THE WITNESS: BY "ACTION," DO YOU MEAN CHANGE OUR DECISION?

THE COURT: SOME ACTIONS, FOLLOWED UP ON IT.

MS. DOLIN: JUDGE, I HAVE ALSO GOT TO OBJECT ON THE BASIS OF TIME.

THE COURT: PRIOR TO THE TIME THAT ECKERD MADE ITS DECISION.

THE WITNESS: I FRANKLY DON'T KNOW THE ANSWER TO THAT QUESTION.

BY MR. RATINER:

Q. WELL, IF YOU KNEW THAT COST CARE DID NOTHING — LET'S ASSUME HYPOTHETICALLY YOU

HAD DEFERRED TO COST CARE, AND YOU THEN FOUND OUT THAT COST CARE WAS A COMPLETE FRAUD, THEY DIDN'T HAVE DOCTORS THERE WHO WERE QUALIFIED, YOU FOUND OUT THAT THEY HAD PEOPLE THERE WHO DIDN'T HAVE ANY EXPERTISE WHATSOEVER IN HANDLING THIS KIND OF STUFF, WHAT WOULD YOU HAVE DONE?

MS. DOLIN: JUDGE, THE SAME OBJECTION AS I MADE

* * *

[46] (RECORD READ.)

A. THE MEDICAL CRITERIA, YES, THAT IS CORRECT.

Q. NOW, WHAT COST CARE CRITERIA ARE YOU REFERRING TO?

A. WHATEVER CRITERIA COST CARE HAS IN ITS POSSESSION TO RENDER ADVICE IN SITUATIONS LIKE THIS.

Q. WELL, YOU HAD TRAVELERS' CRITERIA AND YOU SAID YOU WOULDN'T USE THAT BECAUSE OF COST CARE'S CRITERIA. PLEASE TELL ME, DID YOU HAVE COST CARE'S CRITERIA THERE TO COMPARE IT WITH?

A. NO, IT WASN'T MY JOB TO HAVE THEIR CRITERIA.

Q. DID YOU EVER CALL UP COST CARE AND ASK THEM AS THE PERSON WHO HAS TO MAKE THE DECISION IN

THIS CASE, SHOW ME YOUR CRITERIA FOR YOUR DECISION?

MS. DOLIN: OBJECTION.

THE COURT: I'M GOING TO OVERRULE THE OBJECTION.

YOU MAY ANSWER THAT.

A. NO. WHAT I NEEDED FROM COST CARE WAS THEIR BOTTOM LINE MEDICAL DETERMINATION IN THIS PARTICULAR CIRCUMSTANCE.

Q. WELL, YOU HAD A RESPECTED COMPANY, TRAVELERS, THAT GAVE YOU THEIR CRITERIA. YOU DIDN'T HAVE YOUR OWN CRITERIA, YOU, ECKERD. YOU SAID YOU RELIED UPON COST CARE'S CRITERIA. YOU DIDN'T KNOW WHAT COST CARE'S CRITERIA IS AND YOU DIDN'T BOTHER TO ASK THEM, BECAUSE I THINK YOU SAID THAT WASN'T YOUR BUSINESS, IS THAT RIGHT?

A. IT'S NOT MY BUSINESS TO QUESTION THE MEDICAL CRITERIA . . .

* * *

[71] BEEN ASKED AND ANSWERED.

THE COURT: OVERRULED.

ANSWER THE QUESTION, PLEASE.

Appendix A

A. COST CARE PROVIDED THE MEDICAL ADVICE HERE. I OBTAINED THE INSURANCE COMPANY INFORMATION FOR A DIFFERENT PURPOSE.

MR. RATINER: YOUR HONOR, CAN I HAVE AN ANSWER TO MY QUESTION?

BY MR. RATINER:

Q. MY QUESTION WAS: DID YOU — DID COST CARE — I'M SORRY — DID YOU, DID ECKERD CONTACT ANY PANCREAS TRANSPLANTATION PERFORMING PHYSICIANS ANYWHERE TO ASK THEM JUST THE SIMPLE QUESTION: DO YOU CONSIDER THIS PROCEDURE TO BE EXPERIMENTAL OR INVESTIGATIONAL?

MS. DOLIN: OBJECTION, RELEVANCY, AND ASKED AND ANSWERED.

THE COURT: ALL RIGHT. JUST ANSWER IT AGAIN, MA'AM. YOU DID NOT?

A. NO.

THE COURT: SHE'S ANSWERED THAT BEFORE, MR. RATINER. MISS DOLIN IS RIGHT ABOUT THAT. THAT WAS ANSWERED THIS MORNING.

MR. RATINER: YOUR HONOR, I WOULD LIKE TO INTRODUCE INTO EVIDENCE FOUR LETTERS THAT ARE RELEVANT AND MATERIAL TO THE CONSIDERATION OF THE DEPOSITIONS OF DR. MARLOW, WHOSE TESTIMONY WILL HAVE TO BE TAKEN BY YOUR . . .

Appendix A

* * *

[75] REDIRECT EXAMINATION

BY MS. DOLIN:

Q. NOW, MISS KEENER, ON DIRECT EXAMINATION YOU TESTIFIED, I BELIEVE, THAT THE PLAN PROVIDES DISCRETION TO THE PLAN ADMINISTRATOR TO DECIDE WHAT IS EXPERIMENTAL OR INVESTIGATIONAL IN THE WAKE —

MR. RATINER: YOUR HONOR, I HAVE TO OBJECT. I DON'T RECALL THAT TESTIMONY COMING FROM THIS WITNESS.

MS. DOLIN: IT'S ONE OF THE FIRST THINGS HE ASKED HER, JUDGE.

THE COURT: THE OBJECTION IS OVERRULED.

MS. DOLIN: THANK YOU.

BY MS. DOLIN:

Q. THAT THE PLAN DOES PROVIDE THAT THE PLAN ADMINISTRATOR HAS DISCRETION TO DETERMINE WHICH OF THOSE HUMAN ORGAN TRANSPLANTS ARE, IN FACT, EXPERIMENTAL OR INVESTIGATIONAL. DO YOU REMEMBER THAT TESTIMONY?

A. YES.

Q. ISN'T IT TRUE, MISS KEENER, THAT IN MAKING THAT DETERMINATION, THOSE DETERMINATIONS HAVE TO BE DONE ON A CASE-BY-CASE BASIS BASED ON THE FACTS AVAILABLE?

A. THAT'S RIGHT.

Q. NOW, ISN'T IT IN FACT TRUE THAT MR. SHANNON'S PRE-CERTIFICATION REQUEST CALLED FOR THE PLAN TO MAKE SUCH A . . .

* * *

[111] KEENER – RECROSS

BY MR. RATINER:

Q. DID YOU MAKE ANY EFFORT TO FIND OUT WHETHER ANYONE ELSE AGREED WITH YOUR DEFINITIONS?

A. NOT WITH MY WORKING DEFINITION.

Q. AND YOU HAD NO OTHER DEFINITION, RIGHT?

A. I DIDN'T NEED ANYTHING MORE THAN MY WORKING DEFINITION.

Q. DID YOU EVER MAKE ANY ATTEMPT TO FIND OUT WHETHER THERE WAS ANYONE ELSE IN THIS WHOLE WIDE WORLD WHO AGREED WITH YOUR WORKING DEFINITION?

A. I DIDN'T SEE ITS RELEVANCY.

Q. DID YOU EVER MAKE ANY EFFORT OR ATTEMPT TO FIND OUT IF THERE WAS ANYONE ELSE IN THE WHOLE WORLD WHO AGREED WITH YOUR WORKING DEFINITION OF WHAT WAS EXPERIMENTAL OR INVESTIGATIONAL?

MS. DOLIN: JUDGE, THAT IS IRRELEVANT. ACCORDING TO THE TERMS OF THE PLAN, WHICH GIVE THE PLAN ADMINISTRATOR THE DISCRETION TO DEFINE THOSE TERMS.

THE COURT: CORRECT. BUT I'M GOING TO OVERRULE THE OBJECTION.

BY MR. RATINER:

Q. MA'AM, COULD I HAVE AN ANSWER, PLEASE?

A. MAY I HAVE THE QUESTION AGAIN, PLEASE?

MR. RATINER: READ IT BACK, PLEASE.

THE COURT: DID YOU COMPARE YOUR WORKING DEFINITION OF EXPERIMENTAL WITH ANYONE ELSE?

[112] THE WITNESS: NO.

BY MR. RATINER:

Q. NOW, WHAT WAS THE REASON WHY THE PLAN DID NOT CONTAIN IN THEIR DEFINITION SECTION EVEN

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YOUR WORKING DEFINITION OF WHAT WAS EXPERIMENTAL OR INVESTIGATIONAL?

THE COURT: SUSTAINED.

MS. DOLIN: OBJECT.

THE COURT: SHE DOESN'T KNOW WHY THE PLAN DIDN'T INCLUDE SOMETHING. SUSTAINED.

BY MR. RATINER:

Q. NOW, AS OF OCTOBER 11TH, THE DATE THAT THE DENIAL LETTER WENT OUT — LET ME CLARIFY THIS, IF I MAY. THE DENIAL LETTER OF OCTOBER 11TH WAS BASED PRIMARILY UPON THE LETTER FROM DR. MARLOW, CORRECT?

A. NO.

Q. NO.

YOU REMEMBER PAGE 34 OF YOUR DEPOSITION?

MS. DOLIN: JUDGE, THIS HAS BEEN ASKED AND ANSWERED SEVERAL TIMES. WE HAVE BEEN OVER THIS AD NAUSEAM.

MR. RATINER: THE WITNESS JUST GAVE ME A DIAMETRICALLY OPPOSED RESPONSE FROM DIRECT EXAMINATION NOW TO REDIRECT. I THINK I HAVE GOT TO CLARIFY THAT.

MS. DOLIN: IT IS THE SAME ANSWER SHE GAVE YOU ON DIRECT AND SHE CLARIFIED IT ON CROSS. WE DON'T HAVE TO KEEP GOING OVER THIS.

* * *

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED MARCH 22, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-0271-CIV-NESBITT

THOMAS SHANNON,

Plaintiff,

vs.

JACK ECKERD CORPORATION,

Defendant.

ORDER

This cause comes before the Court upon Defendant Jack Eckerd Corporation's ("Eckerd") Motion for a New Trial. After due consideration, Eckerd's motion is DENIED. While the contentions Eckerd advances were addressed in the Court's Findings of Fact and Conclusions of Law, issued November 18, 1992. The present Order seeks to clarify any ambiguity that may have been raised by the Order of November 18, 1992.

In its Findings of Fact and Conclusions of Law, the Court found that the Plan Administrator of the Jack Eckerd Corporation Health Plan ("the Plan") based her decision to deny Plaintiff Thomas Shannon's ("Shannon") claim for benefits covering a renal/pancreas transplant on the following three criteria: 1) the fact that Medicare denied payment for Shannon's claim, 2) the fact that Eckerd's medical review consultant — Cost Care, Inc.

("Cost Care") — advised her that the pancreas transplant procedure was regarded as investigational by the medical community, and 3) the fact that a number of insurance companies classified the procedure as investigational. The Court determined that the Plan Administrator failed to adequately investigate any of these criteria and that her decision to deny Shannon's claim was therefore "arbitrary and capricious". In accordance with this determination, the Court remanded the case to the Plan Administrator for a new determination concerning Shannon's entitlement to benefits for the renal/pancreas transplant that he underwent in 1991.

In support of its determination that the Plan Administrator failed to adequately investigate the medical status of the pancreas transplant procedure, the Court found that the October 27, 1990 from Dr. Thomas Sutherland — Shannon's treating physician — to the Plan Administrator constituted notice to the Plan Administrator that Cost Care's conclusion that the procedure was investigational may not have been well founded. Eckerd contends that the information referenced in the letter had already been transmitted to Cost Care by the time the Plan Administrator received the letter and that the Plan Administrator was aware of this transmission. Even if this contention is correct, it is irrelevant. The fact that one of the nation's leading authorities on pancreas transplants raised significant objections to Cost Care's conclusion should have induced the Plan Administrator to either question Cost Care as to the basis for its conclusion or to engage a second medical consultant for another evaluation. The Plan Administrator did neither.

Eckerd also contends that the Court's determination that the Plan Administrator failed to adequately investigate the meaning of the term "investigational" within the insurance industry was improper for two reasons. First, the Court did not

define "what a consensus within the insurance community would be," but nevertheless concluded that the Plan Administrator failed to consult a number of insurance companies sufficient to reflect such a consensus. Second, the Court speculated as to the reasons why several of the insurers consulted by the Plan Administrator classified the pancreas transplant procedure as investigational.

Both of Eckerd's contentions lack merit. Eckerd's first contention reveals a misunderstanding of the nature of the Court's determination. The Court determined that *the Plan Administrator* made no effort to ensure that her survey of the views of the insurance community was sufficient to reveal a consensus within that community. It is not necessary for the Court to define what would constitute such a consensus in order to find that the Plan Administrator failed to take any steps to ensure that the responses from the insurers that she contacted reflected a consensus.

Eckerd's second contention also lacks merit. In its Findings of Fact and Conclusions of Law, the Court concluded that reliance on the bare fact that a particular insurer classified the pancreas transplant procedure as investigational, absent any inquiry concerning the reasons underlying this classification, was not reasonable. This conclusion becomes inescapable in view of the grounds upon which an insurer might chose to classify a procedure as investigational. One of the insurance company's contacted by the Plan Administrator might classify the pancreas transplant procedure as investigational because, under the terms of its plans, *all* transplant procedures are classified as investigational. The Plan Administrator had already determined that Eckerd's Plan covered renal transplants and therefore that the Plan covered *some* transplant procedures. The insurance company's classification decision would thus provide no guidance concerning whether to classify the pancreas

transplant procedure as investigational under the terms of Eckerd's Plan[1].

Eckerd also objects to the Court's requirement that, in making a new determination on remand, the Plan Administrator consider all relevant evidence available up to the date of the new determination. All of the relevant decisional authority on point is consistent with this proposition. In *Jett v. Blue Cross and Blue Shield of Alabama,* 890 F.2d 1137 (11th Cir. 1989), for instance, the Eleventh Circuit quoted a Seventh Circuit decision for the proposition that:

> As a general matter a court should not resolve the eligibility question on the basis of evidence never presented (to an ERISA plan's administrator) but should remand to the (administrator) for a new determination.

This language clearly prohibits the *district court* from considering evidence not presented to an ERISA plan administrator when reviewing the administrator's decision under the arbitrary and capricious standard. To allow the district court to consider such evidence would convert review under the arbitrary and capricious standard into *de novo* review[2]. Nothing

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1. The Court engages in "speculation" here to demonstrate that the relevance of the information provided to the Plan Administrator by the insurance companies that she contacted, and thus the reasonableness of her reliance on that information, turn on the reasons why the insurers classified the pancreas transplant procedure as they did. In this light, the Plan Administrators failure to inquire as to these reasons was clearly unreasonable.

2. All of the cases cited by Eckerd simply preclude the *district court,* not the plan administrator, from considering new evidence.

in the quoted language, however, suggests that a plan administrator to is not obligated to consider this evidence. To the contrary, the purpose of remand is to provide the plan administrator with the opportunity to consider the evidence.

Berry v. Ciba-Geigy Corp., 761 F.2d 1003 (4th Cir. 1985) provides the clearest expression of this position. In *Berry*, a case cited with approval by both the Eleventh Circuit and Eckerd, the Fourth Circuit explained that:

> While it is open to the trial judge to consider whether . . . (the plan administrator) erred in not securing sufficient evidence on which to base a termination decision, it was error for the court to admit into evidence . . . after the fact testimony . . . If the court believed the administrator lacked adequate evidence, the proper course was to 'remand to the trustees for a new determination.'. . .

Clearly, if the plan administrator failed to gather sufficient evidence in the course of rendering the first decision, the plan administrator cannot rely exclusively on that evidence in rendering the decision on remand. Rather, the plan administrator must gather enough additional evidence as is necessary to ground a reasonable decision. Moreover, on remand, the plan administrator is obligated to make a *new* determination — i.e., to make a determination as though no prior determination had been made. As a consequence, the plan administrator is obligated to consult all relevant evidence available up to the date of the new determination. Requiring the plan administrator to consult such evidence does not affect the plan administrator's discretion in rendering the decision on remand, it merely requires that the decision be reasonable in light of all the facts presently available.

DONE and ORDERED, in chambers, Miami, Florida, this 22 day of March 1993.

s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: counsel of record

APPENDIX C — ORDER OF REMAND OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED NOVEMBER 16, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-0271-CIV-NESBITT

THOMAS SHANNON,

Plaintiff,

vs.

JACK ECKERD CORPORATION,

Defendant.

ORDER OF REMAND

This cause was tried before this Court during the week of September 21, 1992. Having reviewed all of the evidence properly presented at trial, and all of the applicable law, it is hereby

ORDERED and ADJUDGED that, consistent with the Findings of Fact and Conclusions of Law entered this day, this matter is remanded to the Plan Administrator of the Jack Eckerd Corporation Health Plan ("the Plan") for a new determination concerning whether Shannon is entitled to benefits under the Plan covering the combined kidney/pancreas transplant procedure that Shannon underwent in 1991, and it is further

ORDERED and ADJUDGED that the Court deems this Order of Remand to be a proper request for review of the denial

of Shannon's claim for the aforementioned benefits[1]. As a consequence, the Plan Administrator's decision on remand shall be governed by the provisions of 29 C.F.R. § 2560.503-1(h). In accordance with that regulation, the Plan Administrator shall make this decision within sixty days from the date of this Order, unless the Plan Administrator can detail special circumstances which warrant an extension of time. If such circumstances do prevail, the Plan Administrator shall make the decision no later than 120 days after the date of this Order. It is further

ORDERED and ADJUDGED that Shannon's claim for a declaration of his entitlement to future benefits under the Plan covering a second pancreas transplant is DENIED as Shannon has failed to exhaust his administrative remedies with respect to this claim.

DONE and ORDERED, in chambers, Miami, Florida, this 18th day of November 1992.

s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: counsel of record

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1. By characterizing the procedure required by this Order as a "review," the Court does not wish to suggest that the Plan Administrator may confine his or her analysis concerning whether a pancreas transplant is experimental or investigational to the evidence available at the time of the original denial. Rather, prior to rendering his or her decision on remand, the Plan Administrator must make a reasonable inquiry into all pertinent evidence available up to the date of that decision. *See Bucci v. Blue Cross-Blue Shield of Conn.*, 764 F.Supp. 728, 732 (D.Conn. 1991) ("[D]efendant's duty to provide benefits is a continuing one, its refusal to provide benefits is thus a continuing denial, the propriety of which is measured against the information available from time to time. The information is not static, but is developing.").